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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 1110

RICHARD ASH, SPERRY RAND CORP., GINN & COMPANY, HARPER & ROW, INC. and SCIENCE RESEARCH ASSOCIATES,

*Petitioner,*

*vs.*

INTERNATIONAL BUSINESS MACHINES, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

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April 11, 1966.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 236 F. Supp. 218 (1964) (Pet. App. 13a-19a).* The opinion of the Court of Appeals for the Third Circuit is reported at 353 F. 2d 491 (1965) (Pet. App. 19a-23a).

### JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

*Petitioner's Appendix is designated "Pet. App."; Respondent's Appendix is designated "Res. App.".

## COUNTERSTATEMENT OF QUESTION PRESENTED

Does a stockholder of a corporation have standing, either derivatively or on his own behalf as such a stockholder, to maintain an action under Section 7 of the Clayton Act to enjoin an acquisition involving two other corporations, if the management of the corporation in which he holds stock has declined to institute such an action and if the stockholder has not alleged that management is disqualified to make an independent business judgment on the matter?

## STATUTES INVOLVED

The statutory provisions involved are Sections 7 and 16 of the Clayton Act, 15 U. S. C. §§ 18 and 26. Pertinent portions of those sections are set forth in Petitioner's Appendix 1a-2a.

## STATEMENT

Richard Ash (Ash) seeks review of a judgment of the United States Court of Appeals for the Third Circuit affirming an order of the United States District Court for the Eastern District of Pennsylvania dismissing his complaint for lack of standing (Pet. App. 19a). The complaint sought a permanent injunction preventing International Business Machines Corporation (IBM) from acquiring substantially all the assets of Science Research Associates, Inc. (SRA).

Ash purported to bring the action on behalf of himself and on behalf of three* corporations in which he had small stock interests. Ash had requested the corporations to

*The complaint contained a third count on behalf of SRA. That count has been dropped by Petitioner.

institute an action, but they did not do so. The District Court and the Court of Appeals for the Third Circuit both concluded that Ash did not have standing to bring the action.*

*The Acquisition.* On February 28, 1964, IBM acquired substantially all the assets of SRA in exchange for 128,841 shares of Capital Stock of IBM (Affidavit of Harry Metzger, paras. 3, 13, Res. App. 3b, 5b). The shares of IBM stock were distributed to the stockholders of SRA, who received one share of Capital Stock of IBM for every 13.841 shares of Common Stock of SRA. On the basis of a price of $483.50 per share of Capital Stock of IBM (the closing price on the New York Stock Exchange on December 18, 1963, the date the letter of intent was executed), the consideration to be received by each stockholder of SRA was equivalent to $35 per share of SRA Common Stock (which was trading over the counter on December 18, 1963, at approximately $28 per share).

The transaction was approved at a meeting held February 25, 1964, by an overwhelming majority of shareholders of SRA, each of whom had received a proxy statement describing the terms of the transaction (*id.*, para 8, Res. App. 4b). 1,710,477 of the 1,779,816 outstanding shares of SRA were represented at the meeting. 1,710,217 shares were voted in favor of the proposed transaction. 260 shares (including Ash's 25 shares), constituting less than .02 of 1% of the shares represented at the meeting, voted against approval of the transaction (*id.*, para. 12, Res. App. 5b).

*The Complaint.* The complaint was served upon the manager of the IBM sales office in Philadelphia on February

*The courts below did not reach the other grounds for dismissal asserted by Respondent: (i) mootness, (ii) failure to serve indispensable parties and (iii) failure to comply with Rule 23(b) of the Federal Rules of Civil Procedure.

27, 1964. The sole relief sought by Ash was an injunction preventing IBM from acquiring the assets of SRA; he did not seek a temporary restraining order or preliminary injunction.

The complaint set forth three claims for relief (the last of which has been abandoned). Count I alleged a cause of action pursuant to Sections 7, 15 and 16 of the Clayton Act, 15 U. S. C. §§ 18, 25 and 26, on behalf of Ash and on behalf of Harper & Row, Inc. (Harper) and Ginn & Co. (Ginn), corporations which Ash alleged were competitors of SRA and in which Ash held small stock interests. Ash claimed that the acquisition would substantially lessen competition in the field of "educational training materials" (Complaint, para. 21,, Pet. App. 6a). Ash admitted that Ginn refused to assert this claim against IBM and that Harper had not responded to his demand that it bring such action (*id.*, para. 29, Pet. App. 8a).

Count II is essentially the same as Count I, except that Ash alleged a cause of action on behalf of himself and on behalf of Sperry Rand Corp. (Sperry), a corporation which was alleged to be a competitor of IBM's and in which Ash had a small stock interest. As in the first count, Ash admitted that Sperry had refused to bring an action against IBM (*id.*, para. 38, Pet. App. 9a).

The sole basis upon which Ash claimed the right to maintain this action was his alleged ownership of 50 shares of Common Stock of Harper, 30 shares of Common Stock of Ginn and 57 shares of Common Stock of Sperry, or less than 0.0005 of 1% of the outstanding stock of those corporations. See 1965 Moody's Industrial Manual 897, 1774-77, 2100-01.

## ARGUMENT

### THE DECISION BELOW IS CLEARLY CORRECT AND DOES NOT WARRANT REVIEW BY THIS COURT.

Ash purported to bring Count I on behalf of himself and Harper and Ginn. Count II is alleged to be on behalf of himself and Sperry. As the courts below have held, both Counts are fatally deficient because Ash does not have standing to sue on his own behalf and does not have standing to sue on behalf of the corporations in which he holds stock. Ash maintains that the policies underlying Section 7 of the Clayton Act require that stockholders be permitted to bring suits on behalf of their corporations. He cites no support for that position, and none exists. While Congress undoubtedly wished to encourage private enforcement of the antitrust laws by persons aggrieved by violations, it did not intend in the process to authorize litigation by "strangers" to the violations and thereby to subvert the orderly management of corporations.

**First. The Business Judgment Rule Has Long Been Settled In The Decisional Law Of This Court.**

In his complaint, Ash admitted that the management of each corporation declined to sue, but did not allege that the officers or directors of Harper, Ginn or Sperry are or have been disqualified from exercising their business judgment (Complaint, paras. 29, 38, Pet. App. 8a, 9a).

Since *Hawes* v. *Oakland,* 104 U. S. 450, this Court has made crystal clear that a stockholder has a right to maintain an action on behalf of a corporation in which he holds stock only if the management of that corporation is disqualified from exercising independent judgment. Not only does the Petition fail to show a conflict of decisions on this

subject, it does not cite one case lending any support to its argument to the contrary, and none exists.*

In *Hawes* the Court defined the circumstances which would permit a stockholder to assert a claim on behalf of his corporation:

> "We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

---

*Ash cites six cases involving the submission by a corporation to allegedly illegal taxes or allegedly illegal governmental action. Suit to prevent, in effect, payment by the corporation of an illegal tax is meaningfully different from a derivative action, such as the instant one, against a third party. See *Gen'l Inv. Co.* v. *New York Central R. R.*, 23 F. 2d 822, 823-24 (6th Cir. 1928), *cert. denied*, 277 U. S. 588.

The two tax cases cited by Ash are: *Dodge* v. *Woolsey*, 18 How. 331; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429. *Dodge* held that the directors' failure to sue to recover an illegally collected tax was a breach of trust. The directors thought the tax illegal, had made two previous protests against the constitutionality of the tax, and had resolved not to pay the tax unless compelled to do so. The Court said that "the refusal upon the part of the directors, *by their own showing*, partakes more of disregard of duty, than of an error of judgment." (Emphasis added.) The directors were joined as defendants making clear that Woolsey was charging them with a breach of trust. In *Pollock* a stockholder in a bank sought a decree against the defendant and its directors declaring a proposed tax to be unconstitutional and enjoining the payment of the tax.

The four cases cited by Ash involving submission by a corporation to allegedly illegal governmental action are: *Ashwander* v. *T. V. A.*, 297 U. S. 288; *Chicago* v. *Mills*, 204 U. S. 321; *Cotting* v. *Kansas City Stockyard Co.*, 183 U. S. 79; *Greenwood* v. *Freight Co.*, 105 U. S. 13. Participation or acquiescence by the directors of a corporation in an illegal act, which includes illegality based on the lack of lawful authority on the part of those with whom the corporation is attempting to deal, constitutes a breach of duty on the part of the directors enabling a stockholder to seek equitable relief. *Ashwander* v. *T. V. A.*, *supra* at 319-20.

"Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

"Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

"Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases." 104 U. S. at 460.

The *Hawes* doctrine was reaffirmed in the context of the antitrust laws by the decision in *United Copper Sec. Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261, 263-64. The Court upheld dismissal of a complaint by a stockholder seeking to enforce, on behalf of the nominal corporate defendant, a claim against a third party for violation of the Sherman Act. 15 U. S. C. §§ 1-7. Mr. Justice Brandeis stated:

"Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is,

> like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery. . . . The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual shareholders the right to interfere with the internal management of the corporation."

These two decisions have been repeatedly followed and applied. See *Swanson* v. *Traer,* 354 U. S. 114, *on remand dismissal aff'd,* 249 F. 2d 854 (7th Cir. 1957); *Stadin* v. *Union Electric Co.,* 309 F. 2d 912, 921-22 (8th Cir. 1962), *cert. denied,* 373 U. S. 915; *Okin* v. *SEC,* 143 F. 2d 943 (2d Cir. 1944). See also *McClure* v. *Borne Chemical Co.,* 292 F. 2d 824, 827-28 (3d Cir. 1961) (dictum), *cert. denied,* 368 U. S. 939; *Rogers* v. *American Can Co.,* 305 F. 2d 297 (3d Cir. 1962) (a derivative suit against directors, which distinguishes *Hawes* and *United Copper,* the board of directors of the nominal defendant being implicated in the alleged illegal acts); Note, 73 HARV. L. REV. 746, 760 (1960).

Thus, the authorities clearly support the decisions below. Speaking for a unanimous Court of Appeals, Judge Hastie

noted that: ". . . [N]othing is pleaded or even suggested to indicate that the refusal of the directors to sue was fraudulent or collusive, or represented anything worse than unsound business judgment honestly exercised in the corporate interest." (Pet. App. 20a). Ash attempts to circumvent this fundamental defect in pleading by contending that for present purposes the allegations of the complaint should be deemed true, and therefore (so Ash argues) the directors acted improperly in not seeking redress against IBM (Pet., p. 8). Ash is incorrect in stating that, for purposes of the motion to dismiss the complaint, IBM's acquisition of SRA must be assumed to have violated Section 7 of the Clayton Act*; the management of each of the corporations was entitled to determine for itself that question. But even if it is assumed that the complaint states a valid claim on behalf of the beneficiary corporations, it does not follow that the directors are guilty of misconduct in declining to bring the action. It is easy enough to state a claim, but the corporations still have to prove the allegations. In determining whether to bring suit, management has to weigh the problems of proof, the costs, and the possible disruption of its business. There has been no showing or even contention that the managements of Harper, Ginn and Sperry were unable to make an informed judgment on whether to bring an action against IBM.

The management of a corporation is entrusted with looking after the best interests of all stockholders. One stockholder should not be permitted to force corporate action which may be to the detriment of the other stockholders—

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*Only allegations of fact are assumed to be true on a motion to dismiss; conclusory allegations of unlawfulness are not. See *Pauling* v. *McElroy*, 278 F. 2d 252 (D. C. Cir. 1960); *Dunn* v. *Gazzola*, 216 F. 2d 709, 711 (1st Cir. 1954); *Smith* v. *United States*, 113 F. Supp. 131 (D. Del. 1953); *Le Clair* v. *Swift*, 76 F. Supp. 729 (E. D. Wisc. 1948).

unless management is demonstrated to be incapable of impartially determining the interests of the corporation. Ash has not set forth any reasons for eliminating the "business judgment" rule that would justify this Court's reexamination of that longstanding doctrine.

**Second. The Business Judgment Rule Cannot Be Undermined By An Individual Action On Petitioner's Own Behalf.**

Ash alleges that Counts I and II are brought on behalf of himself as well as on behalf of the named corporations (Complaint, paras. 2, 31, Pet. App. 4a, 8a). (The complaint, however, does not allege in either Count that Ash himself will suffer damage. Ash apparently bases the action on his own behalf on possible diminution of the value of his stock interests.)

A private plaintiff suing under Section 16 of the Clayton Act to enjoin antitrust violations must demonstrate "threatened loss or damage" flowing directly from the alleged violation to himself. Under Section 4 of the Clayton Act a suit for damages may be brought by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." There is no difference in the standard to be applied in determining the rights of a private party under those two sections of the Clayton Act. An allegation of direct injury to the plaintiff is a prerequiste.

> "Section 15 of the Clayton Act, 15 U. S. C. § 25, charges the United States district attorneys, under supervision of the Attorney General, with the duty of instituting equity proceedings to prevent and restrain violations of certain of the antitrust laws, including price discrimination. Under § 16 of the Act, 15 U. S. C. § 26, a private plaintiff may obtain injunctive relief against such violations only on a show-

> ing of 'threatened loss or damage'; and this must be of a sort personal to the plaintiff, *Beegle* v. *Thompson,* 138 F. 2d 875, 881 (1943). The private-injunction action, like the treble-damage action under § 4 of the Act, supplements government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws." *United States* v. *Borden Co.,* 347 U. S. 514, 518.

The *Beegle* case referred to in *Borden* involved the standing of a plaintiff to sue for treble damages under Section 4 of the Clayton Act. Its citation in connection with the determination of rights under Section 16 demonstrates that the Court considers the criteria for determining standing under the two sections to be the same, namely, a showing of personal loss or damage.

The courts have consistently held that a stockholder may not sue on his own behalf for damages under Section 4 of the Clayton Act resulting from injury to the corporation in which he owns stock, even if he owns all the stock or the corporation has ceased to exist. See *Walker Distributing Co.* v. *Lucky Lager Brewing Co.,* 323 F. 2d 1, 10 (9th Cir. 1963); *Martens* v. *Barrett,* 245 F. 2d 844 (5th Cir. 1957) (collecting cases at 846 n. 4); *New Sanitary Towel Supply, Inc.* v. *Consolidated Laundries Corp.,* 211 F. Supp. 276 (S. D. N. Y. 1962); *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.,* 193 F. Supp. 401, 407 (S. D. N. Y. 1961); *Gomberg* v. *Midvale Co.,* 157 F. Supp. 132, 140 (E. D. Pa. 1955), *appeal dismissed sub nom. Brill* v. *Gen. Industrial Enterprises, Inc.,* 234 F. 2d 465 (3d Cir. 1956).

The courts have likewise held that a stockholder's stock interest does not give him standing to sue for injunctive

relief under Section 16 of the Clayton Act to prevent alleged damage to his corporation.* See *General Inv. Co.* v. *New York Central R. R.*, 23 F. 2d 822 (6th Cir. 1928), *cert. denied*, 277 U. S. 588; *Continental Securities Co.* v. *Michigan Central R. R.*, 16 F. 2d 378 (6th Cir. 1926); *Gomberg* v. *Midvale Co., supra; National Supply Co.* v. *Hillman*, 57 F. Supp. 4 (W. D. Pa. 1944).**

Ash's only interest in the cause of action is as a holder of less than 0.0005 of 1% of the stock of each of Harper, Ginn and Sperry. In the face of the plain statutory language, the decisions of this and the lower federal courts, and the failure to allege individual damage, the contentions advanced in the Petition do not warrant review here:

> "Indeed, were the rule otherwise the distinction between a stockholder's derivative claim and a claim exercised in his primary right would disappear, and the public policy based strictures on derivative suits could be avoided merely by asserting that economic harm to a corporation in itself constituted justiciable

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*In an analogous situation—an attempt by a person not a party to a consent decree to enforce the decree in a contempt action—the Second Circuit recently held that policy considerations supported refusal to permit a party alien to the action to enforce a consent decree, *United States* v. *American Society of Composers, Authors and Publishers*, 341 F. 2d 1003, 1008 (2d Cir. 1965), *cert. denied*, 382 U. S. 38:

> "Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights."

**Ash attempts to distinguish *Continental Securities* by arguing that the injury in question was the threat of treble damage suits to the corporation; it was not (see 16 F. 2d at 380).

Ash makes no effort to distinguish *General Inv. Co.* v. *New York Central R. R.* and *National Supply Co.* v. *Hillman* which stand directly against his position.

personal injury to each owner of stock in the corporation." (Opinion below, Pet. App. 23a).

**Third. The Business Judgment Rule Does Not Impair Private Enforcement Of The Antitrust Laws.**

Ash argues that if he is held to lack standing to sue it will impair private enforcement of the antitrust laws. His error, however, stems from confusing private enforcement with individual enforcement by Ash. The antitrust laws envision two types of enforcement: public and private. In this case the acquisition by Respondent has come to the attention of the public authorities charged with enforcing the antitrust laws.* And, the private parties in this case whose interests are allegedly affected—Harper, Ginn and Sperry—have declined to sue. Ash's objection is not that there is a lack of private enforcement but rather that he, individually, should be entitled to sue when he disagrees with the proper private parties' decisions not to do so.**

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*Ash appended to his Memorandum in Opposition to Defendant's Motion To Dismiss in the District Court, copies of his correspondence with the Antitrust Division of the Department of Justice calling attention to the acquisition.

**Ash cites Blake, *Shareholders' Role in Antitrust Enforcement*, 110 U. Pa. L. Rev. 143, 149 (1961), as stating that "it is open to question whether Congress' policy of encouraging antitrust enforcement through private suits should be defeated by giving weight to management reluctance to upset perhaps overly amicable relationships within the industry." Professor Blake's article, however, goes on (at 156) to make clear that this suggestion applies to a continuing course of conduct and *per se* violations such as price fixing and not to a single transaction, such as a merger. "In the latter class of cases [such as price fixing], *but not the former* [such as mergers], shareholder intervention through derivative suits seems defensible." (Emphasis added.)

## CONCLUSION

In sum, the petition seeks review of a decision that was clearly correct in light of the unambiguous precedents, reveals no conflict of decisions, and raises no novel or important question of law. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP H. STRUBING
GEORGE B. TURNER
*Attorneys for Respondent.*

PEPPER, HAMILTON & SCHEETZ
CRAVATH, SWAINE & MOORE
*Of Counsel.*

# APPENDIX.

## AFFIDAVIT OF HENRY W. TRIMBLE, JR., IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

HENRY W. TRIMBLE, JR., being duly sworn, deposes and says:

(1) I am the Secretary of International Business Machines Corporation, a New York corporation (hereinafter called IBM).

(2) Pursuant to an Agreement and Plan of Reorganization dated January 21, 1964, between IBM and Science Research Associates, Inc., a Delaware corporation (hereinafter called SRA), substantially all the assets of SRA were transferred to a wholly-owned subsidiary of IBM in exchange for the delivery to SRA of 128,841 shares of Capital Stock of IBM and the assumption by said wholly-owned subsidiary of IBM of the liabilities of SRA. In accordance with said Agreement and Plan of Reorganization, the stockholders of SRA became entitled to exchange their certificates representing shares of common stock of SRA for certificates representing shares of Capital Stock of IBM on a basis of 13.814 shares of SRA stock for one share of IBM stock. Harris Trust and Savings Bank was designated to act as agent for SRA stockholders in effecting that exchange. As of August 25, 1964, all but 600 of the 1,779,816 shares of Common Stock of SRA had been surrendered for cancellation in exchange for shares of Capital Stock of IBM. At that date Harris Trust and

Savings Bank held for the account of the holders of said 600 shares of Common Stock of SRA, 45 shares of Capital Stock of IBM and $4,444.78 for the settlement of fractional shares of Common Stock of SRA.

HENRY W. TRIMBLE, JR.
Henry W. Trimble, Jr.

Subscribed and sworn to before me this 28th day of August, 1964.

ELSIE M. VOGLER,
*Notary Public.*

ELSIE M. VOGLER
Notary Public, State of New York
State No. 60-9476200
Qualified in Westchester County
Cert. filed in New York County
Term Expires March 30, 1966

**AFFIDAVIT OF HARRY METZGER IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS.**

STATE OF ILLINOIS,
COUNTY OF COOK, } *ss.:*

HARRY METZGER, being duly sworn, deposes and says:

(1) I am the Secretary of 259 East Erie Street Liquidating Corporation (formerly Science Research Associates, Inc.), a Delaware corporation (hereinafter called Old SRA). A Certificate of Dissolution of Old SRA has been filed, and Old SRA will be effectively dissolved upon publication of the Certificate of Dissolution in accordance with Section 275 of the General Corporation Law of Delaware.

(2) I also am the Secretary of Science Research Associates, Inc. (formerly SRA Acquisition, Inc.), a Delaware corporation (hereinafter called New SRA). The plaintiff, Richard Ash, was a shareholder of record of Old SRA; he is not and has never been a shareholder of New SRA. New SRA is a wholly owned subsidiary of International Business Machines Corporation, a New York corporation (hereinafter called IBM).

(3) By letter agreement dated December 18, 1963, between Old SRA and IBM (attached hereto as Exhibit A), IBM agreed to purchase, either directly or through a subsidiary organized for that purpose, the business and substantially all the assets of Old SRA in exchange for the issuance to Old SRA of 128,841 shares of Capital Stock, par value $5 per share (hereinafter called the IBM Shares), of IBM and the assumption by IBM or such subsidiary of substantially all the liabilities of Old SRA. That agreement was subject to necessary corporate action and the execu-

tion and delivery of a formal agreement setting forth the detailed terms and conditions of the transaction.

(4) On December 18, 1963, the agreement was publicly announced (see Press Release attached as Exhibit B), and such announcement was widely reported on the financial pages of newspapers and other publications (see, *e.g., The Wall Street Journal,* December 20, 1963, pp. 1, 4; *The New York Times,* December 20, 1963, pp. 43, 47; *The Philadelphia Evening Bulletin,* December 20, 1963, p. 35).

(5) On January 7, 1964, the Board of Directors of Old SRA approved the contemplated transaction and called a special meeting of the stockholders of Old SRA to be held on February 25, 1964, (i) to approve the transaction, (ii) to approve the change of name of Old SRA to "259 East Erie Street Liquidating Corporation" subsequent to completion of the transfer of assets and (iii) to approve the dissolution of Old SRA.

(6) On January 21, 1964, IBM and Old SRA executed and delivered the Agreement and Plan of Reorganization dated January 21, 1964 (hereinafter called the Agreement), a copy of which is attached hereto as Exhibit C.

(7) Attached hereto as Exhibits D and E are letters dated January 20, 1964 and February 5, 1964, from Richard A. Ash to the President of Old SRA.

(8) On or about January 28, 1964, Old SRA mailed or delivered to its stockholders of record on January 21, 1964, a letter from its President, a Notice of Special Meeting, an Information Statement (copies of which are attached as Exhibit F) and a form of Proxy.

(9) On February 10, 1964, a Notice of Special Meeting of Stockholders of Old SRA was published pursuant to Section 275(a) of the General Corporation

Law of Delaware in connection with the proposed dissolution of SRA.

(10) Paragraph 5 of the Agreement provided that the closing of the sale of substantially all the assets of Old SRA was to take place on the later of February 26, 1964, or the tenth business day following receipt by Old SRA of a satisfactory ruling from the Internal Revenue Service as to the tax-free character of the proposed transaction. It was the intention of both parties that, if possible, the closing would take place at the end of a calendar month.

(11) On February 20, 1964, Old SRA received a ruling from the Internal Revenue Service satisfactory to Old SRA, except that clarification was required on two points. That clarification was included in a subsequent letter from the Internal Revenue Service.

(12) On February 25, 1964, the stockholders of Old SRA, by a vote of 1,710,217 shares to 260 shares (an aggregate of 1,779,816 shares being outstanding), approved the proposed transaction with IBM, including the change of name of Old SRA to "259 East Erie Street Liquidating Corporation" and the liquidation and dissolution of Old SRA.

(13) The closing under the Agreement was held on February 28, 1964, the last business day in the month of February. On that date substantially all the assets of Old SRA were transferred by Old SRA to New SRA, under its then name "SRA Acquisition, Inc.", and New SRA assumed substantially all the liabilities of Old SRA. IBM issued to old SRA a certificate representing the IBM Shares.

(14) In accordance with the Agreement, commencing on March 2, 1964, the IBM Shares were available for distribution pro rata, to the holders of Common Stock of Old SRA upon surrender for cancella-

tion of their shares of Common Stock of Old SRA. As of March 30, 1964, 1,454,751 of the 1,779,816 shares of Common Stock of Old SRA had been surrendered for cancellation in exchange for IBM Shares. The remaining IBM Shares are held by Harris Trust and Savings Bank as agent for the holders of Common Stock of Old SRA.

(15) On March 4, 1964, the name of New SRA was changed from "SRA Acquisition, Inc.", to "Science Research Associates, Inc.", and the name of Old SRA was changed to "259 East Erie Street Liquidating Corporation".

(16) On April 1, 1964, Old SRA filed a certificate of Dissolution in the office of the Secretary of State of the State of Delaware pursuant to Section 275 of the General Corporation Law of the State of Delaware.

(17) Old SRA is no longer carrying on any business; all its assets have been liquidated and distributed, except for $50,000 which is being held to cover liquidation and dissolution expenses, pursuant to paragraph 6(c) of the Agreement. Any part of that amount not expended in connection with the liquidation and dissolution will be paid to IBM in accordance with the Agreement.

HARRY METZGER.
Harry Metzger.

Subscribed and sworn to before me this 1st day of April, 1964.

JOAN M. PIRAINO,
*Notary Public.*

(Seal)

**Exhibit A.**

INTERNATIONAL BUSINESS MACHINES CORPORATION
590 Madison Avenue, New York 22, N. Y.

Office of Vice President

December 18, 1963

Lyle M. Spencer, President
Science Research Associates, Inc.
259 E. Erie Street
Chicago, Illinois

Dear Sir:

Confirming the understanding reached in our recent conversations, International Business Machines Corporation (IBM) has agreed to purchase, either directly or through a subsidiary organized for that purpose, the business and substantially all the assets of Science Research Associates, Inc. (SRA) in exchange for the issuance to SRA of 128,841 shares of IBM's Capital Stock, and the assumption by IBM, or such subsidiary, of substantially all the liabilities of SRA.

That understanding is subject to the following conditions:

(1) All requisite corporate action shall be taken to approve the terms of the understanding and to authorize the transaction, including approval by the Boards of Directors of SRA and IBM and by the stockholders of SRA at a special meeting to be called for that purpose.

(2) SRA and IBM shall sign and deliver a formal agreement setting forth the detailed terms and conditions of the transaction, including the following:

(i) customary and adequate representations and warranties of SRA as to its financial statements, litigation, taxes, title to property, long-term leases and contracts, employment agreements and other compensation arrangements, patents, trademarks, copyrights, and such other items as may bear upon the value of the business and assets of SRA to be transferred, such representations and warranties, however, not to survive the closing;

(ii) appropriate provisions for the termination of the agreement in the event of the institution or threat of litigation or administrative proceedings which would have a materially adverse effect on IBM or SRA or upon the validity of the transaction hereby contemplated;

(iii) a representation by each "affiliate" of SRA that he will acquire the IBM shares to be acquired by him on the liquidation of SRA for investment with no present intention of selling the same except that he may sell portions of such stock within the limits provided in Rule 133 under the Securities Act of 1933; and

(iv) agreement by the President of SRA that he will, after consumation of the transaction, become an employee of IBM or such subsidiary and will not engage in any activities competitive with the business of SRA, and that he will use his best efforts to obtain similar agreements from such other key employees of SRA as shall be designated by IBM and such President.

(3) If the agreement contemplated by paragraph (2) is not signed by IBM and SRA by January 31, 1964, this letter of understanding shall thereupon terminate.

Neither SRA nor IBM has employed a broker or finder in connection with the proposed transaction and all nego-

tiations have been carried out between the parties without the intervention of any other person. SRA and IBM shall each be responsible for its own fees and expenses incurred in connection with the negotiation of the understanding described herein and consummation of the proposed transaction.

Please confirm your agreement with the foregoing by signing where indicated below.

Very truly yours,

INTERNATIONAL BUSINESS MACHINES CORPORATION,

By J. W. BIRKENSTOCK
J. W. Birkenstock
Vice President

Confirmed:

SCIENCE RESEARCH ASSOCIATES, INC.

By LYLE M. SPENCER
Lyle M. Spencer
President

**Exhibit B.**

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**For release:**

IMMEDIATE

*From*

IBM

*International Business Machines Corporation*
*590 Madison Avenue*
*New York 22, New York*

Arnold Lerner
PLaza 3-1900

CHICAGO, Dec. 18 . . . Science Research Associates, Inc., a Chicago-based publisher of educational materials and psychological tests, will become affiliated with International Business Machines Corporation, it was announced today by Lyle M. Spencer, president of SRA, and Thomas J. Watson Jr., chairman of IBM.

The business and operations of SRA will be carried on by a separate subsidiary of IBM under the direction of the present management and staff, the announcement said. Its headquarters will continue to be in Chicago. IBM will issue 128,841 shares of its capital stock in exchange for the SRA business and assets. Based on its 1,779,816 outstanding shares, SRA will receive one IBM share for every 13.814 shares of SRA.

The arrangements are subject to working out the details of a formal agreement and to approval by both boards of directors and by the Science Research Associates stockholders.

Science Research Associates has a staff of 700 employees. During its fiscal year ended June 30, 1963, its total sales were $13,900,000 and its net income $1,320,000.

SRA develops and publishes new types of instructional materials in basic subjects for elementary schools and high schools. The company specializes in building modern learning systems, including its well known Reading Laboratories.

In the area of testing, SRA's activities include the development and publication of a wide variety of standardized intelligence, aptitude and achievement tests and administration of several national testing programs, including the National Merit Scholarship Qualifying Test. SRA's materials in all these fields are widely approved by educators and are extensively used throughout the country.

Mr. Watson said: "We at IBM are very pleased to have Science Research Associates join our organization. By combining resources, we believe that together we will be able to make increasingly important contributions to the growing educational needs of our country and other nations."

Mr. Spencer said: "Over the past twenty-five years, Science Research Associates has devoted its efforts to improving the quality of education by supplying teachers with better types of learning systems. In joining IBM, we expect to do an even better job."

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**Exhibit C.**

(Omitted)

**Exhibit D.**

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*Richard A. Ash*
*School of Law*
*University of Pennsylvania*
*Philadelphia 4, Pennsylvania*

January 17, 1964

Mr. Lyle M. Spencer
President, Science Research Associates
259 East Erie Street
Chicago, Illinois

Dear Mr. Spencer:

I am a stockholder in Science Research Associates since its initial public offering in December 1961. I was deeply disturbed and perplexed to learn via the papers of your proposed merger, so much so in fact that I discussed the matter with your treasurer by long distance telephone. I purchased stock in your company on the basis of my desire to participate in the particular opportunity held out in your offering circular. On the basis of my belief in the potential of your company I retained my interest during a perilous phase in the securities' market. Your company has shown impressive growth trends, and there is every indication that your future is extremely bright. You are a virile, creative company on the edge of tapping a vast new market, that of programmed teaching techniques. It is difficult to understand how your stockholders are benefited by spreading your opportunity over a much wider base. I feel that your actions in this matter

in first inducing the sale of stock to the public by holding out a particular opportunity, and then, with no intervening justification through change of corporate fortune, to utilize your control to, in essence, withdraw the opportunity and resell to a bidder more favorable to insider interests, is at the least grossly unfair. I feel very much like a customer at a race track who after placing a bet on a 100-1 shot is told when the race is well underway and his horse has taken a substantial lead that the management has sold the track and voided his ticket, but he will be given twice his money back. It is my understanding that you personally control approximately 54% of the corporation's stock. If the merger is consummated you will receive about 34 million value of highly negotiable I. B. M. stock, in addition retaining your present position of leadership of S. R. A., operating after the merger as a subsidiary of I. B. M. It seems clear that you are in no position to fairly represent the interests of the outside stockholders. The very minimum of fairness would dictate that the stockholders be divided into two groups to vote on the question.

I think that you should seriously reconsider the appropriateness of this merger. I do not see why Science Research Associates should throw in its winning hand now. Certainly a jointly owned and operated subsidiary could utilize your additive talents without the necessity of obliterating your corporate identity. It is my understanding that I. B. M. has a long history of anti-competitive behavior and is currently operating under several consent decrees. I do not feel that the interests of American education can be furthered by submerging a virile creative organization such as yours in a corporate conformity structure such as I. B. M. I do not feel this merger is favorable to the interests of your outside stockholders or the American public.

Sincerely,

RICHARD ASH
Richard Ash

**Exhibit E**

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*Richard A. Ash*
*School of Law*
*University of Pennsylvania*
*Philadelphia 4, Pennsylvania*

Mr. Lyle M. Spencer
President
Science Research Associates
259 East Erie Street
Chicago 11,
Illinois

Dear Mr. Spencer,

I appreciate your prompt and courteous attention to my earlier letter.

I have recently received the reorganization proposal, and now register my formal protest to your proposed sale of corporation assets to I. B. M. I feel the transaction is violative of section seven of the Clayton Act (anti-trust statute) and exposes the resultant combination to legal action with consequent economic injury to your stockholders.

In addition I protest the valuation accorded to stockholders similarly situated to myself. I feel that my interests have not been properly represented or protected in this matter.

Yours truly,

RICHARD A. ASH
Richard A. Ash

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**Exhibit F**

(Omitted)